IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2269 of 1988

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAYANTILAL RAMANLAL JAYASWAL

Versus

GUJARAT HOMEOPATHIC SOCIETY

Appearance:

1. Special Civil Application No. 2269 of 1988

MR AK CLERK for Petitioner

MR BIPIN I MEHTA for Respondent No. 1,2

MR MS RAO, AGP for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI

Date of decision: 07/11/2003

ORAL JUDGEMENT

1. The petitioner challenges the order dated 19-2-1988, at Annexure "F" to the petition, terminating

his service as the Head of Pharmacy Department of Homeopathy Medical College & Hospital, Anand.

2. The petitioner was, at the relevant time, serving as the Professor in the Homeopathy and was Head of the Department of Pharmacy in the respondent No.2 College. The respondent No.1 Gujarat Homeopathy Society is a society registered under the Indian Societies Registration Act and manages the Homeopathy Medical College & Hospital. The respondent No.2 College is a recognized institution under the Gujarat Homeopathy Act, 1963 offering four years' diploma course. According to the petitioner, the Council established under the said Act is controlled by the State Government and regulates the functioning of the respondent No.2 by virtue of the provisions of the Act and the regulations made thereunder. The respondent NO.2 College is also an institution recognized under the Homeopathy Central Council Act, 1973 under which the Homeopathy (Minimum Standards of Education) Regulations, 1983 are framed.

3. The petitioner initially joined as a labourer and became a Professor. He resigned on 2nd October 1980 for personal reasons and was issued a certificate of excellence by the Principal. He was again invited by the College and came to be appointed as a full-time Professor by an order dated 31st August 1981 in the payscale of Rs.700 - Rs.1500.

4. It appears that the petitioner claimed a higher payscale and issued a notice to the respondent No.2 in that regard on 19-12-1985, followed by a Regular Civil Suit No.228 of 1986, in which he prayed for the payscale of Rs.1100 - Rs.1600. At the time when his service came to be terminated, that suit was pending. According to the petitioner, on such claim being made, the respondents were annoying and ultimately, issued a show cause notice on 3rd September 1986, as per Annexure "D" to the petition, making several allegations therein, calling upon him to show cause as to why the disciplinary proceedings should not be initiated against him, because, the allegations enumerated therein were of serious nature and undermined the reputation of the institution.

4.1 The petitioner contested the allegations by his reply dated 7-9-1986. According to the petitioner, the persons who are said to have made allegations against the petitioner were never examined at the inquiry. During the pendency of the inquiry, the petitioner filed Regular Civil Suit No. 25 of 1987 challenging the inquiry on various grounds. Admittedly, interim injunction was

granted against the holding of inquiry in that suit by the Civil Judge [J.D.] - Anand and at the time when his service was terminated under the impugned order, the suit was still pending and interim injunction was operative.

5. During the pendency of the said suit and the currency of the interim relief against the inquiry, it appears that the inquiry report was made on 4-7-1987, a copy of which is at Anenxure "J" to the petition. As per that report, it was held that the charge of misconduct against the petitioner was not established and that the principal's version against of misconduct against the petitioner was not established. It was held that the Principal Dr.Bhatt had created unnecessary nuisance and his statements were not reliable. It was, however, recommended that the petitioner may not be appointed as an examiner. It appears from the averments made in the amended paragraph 11.7 which are not controverted that the council passed a resolution on 30th July 1987 deciding to file the matter against the petitioner. Even at that time, the suit against the inquiry was pending and injunction was operative. Obviously, therefore, the inquiry could not have been proceeded with against the petitioner even if the council had not agreed with the inquiry report and had chosen to proceed with the inquiry. Soon thereafter, on 19th February 1988, the impugned order, at Annexure "F" to the petition, came to be passed terminating the services of the petitioner who had worked for several years as a Professor and the Head of Department.

6. A preliminary contention was raised on behalf of the respondents is that the respondents were not State under Article 12 of the Constitution and therefore, the petition was not maintainable. Reliance was placed on the decision of a Division Bench of this Court in Dr.C.A.Shah v. Gujarat Cancer & Research Institute, Ahmedabad, reported in XXXIII(1) GLR 687 in support of this contention. It was held by the Court that the said research institute was not a State for the reasons given in paragraph 21 of the judgement. The Court found that the institute was creation of a contract between the Gujarat Cancer Society and the State Government, and was not a statutory body, and further that its funds consisted of properties belonging to Gujarat Cancer Society, gifts, donations and also grants by the Government. On facts of the case, it was found that the institute was not an agency or instrumentality of the Government for carrying out governmental functions.

7. The learned counsel for the respondents also

relied upon the decision of the learned Single Judge in Pravinbhai A. Lingalia v. K.J.Mehta T.B.Hospital, reported in 1998(2) GCD 1048 (Guj), in which it was held that the hospital run by a trust receiving 60% aid from the government and arranging 40% finance from donations did not fall under Article 12 of the Constitution and therefore, writ was not maintainable. The learned Single Judge held that the government had no pervasive control in running of the hospital, and that, when the trust was running a hospital, it cannot be said to be discharging functions of public importance. On facts, it was found that the trust was not acting as an agency or instrumentality of the State so as to come within the purview of the expression "other authorities" under Article 12 of the Constitution.

8. In the present case, undisputedly the respondent No.2 Medical College & Hospital is run on the basis of 100% grant of salary given by the State Government by direct payment and 50% of expenses for running the Medical College & Hospital. Functioning of the institution is wholly controlled by the regulations framed by the council which itself is under the complete control of the State Government, as can be seen from the provisions of sections 37 and 38 of the said Act. The question as to whether the Council for Scientific and Industrial Research falls within the definition of State under Article 12 of the Constitution came up for consideration before a Seven Judge Bench of the Supreme Court in Pradip Kumar Biswas v. Indian Institute of Chemical Biology, reported in (2002)5 SCC 111. A contention was raised that the Council of Scientific and Industrial Research was not "State" within the meaning of Article 12 and therefore, the writ application was not maintainable. The Council for Scientific and Industrial Research was a society registered under the Registration of Societies Act, 1860. The Supreme Court, by its majority view, held that the tests formulated in Ajay Hasiya v. Khalid Mujib Sehravardi, reported in (1981)1 SCC 722, for determining as to when a corporation can be said to be an instrumentality or agency of the government are not a rigid set of principles so that if a body falls within any one of them, it must, ex hypothesi be considered to be a State within the meaning of Article 12. The question in each case would be whether, in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the government. Such control must be particular to the body in question and must be pervasive. If this is found, then the body is a State within the meaning of Article 12. On the other hand,

when the control is merely regulatory, whether under Statute or otherwise, it would not serve to make the body as a State.

9. In the present case, there is no dispute about the fact that, the appointment of the professors and other staff in the institution was subject to the prior approval of the State Government. The entire salary of the professors and other staff was paid by the State Government. The learned Assistant Government Pleader appearing for the State Government submitted that the State Government was having pervasive control over the respondent No.2 because of the 100% grant given for the teaching and other staff and in view of the prior approval needed for appointment of the staff, as also for sanctioning their payscales. There is no dispute about the fact that the payscales which are applicable to the government employees are extended even to the employees of the respondent No.2. Merely the fact that the respondent No.2 is a society registered under the Societies Registration Act, 1860, cannot be conclusive for holding that it is not an authority within the meaning of Article 12. Therefore, keeping in view the ratio of Pradip (supra) and the facts and circumstances of the case, it cannot be disputed that the respondent No.2 is "State" within the meaning of Article 12.

10. From the facts of the case, it is abundantly clear that the allegations of a very grave nature were made against the petitioner in the show-cause notice dated 3rd September 1986 which he contested, and that the Civil Court had issued interim injunction in Regular Civil Suit No.25 of 1987 filed by the petitioner restraining the respondents from holding any departmental proceedings against him which was operative on the date on which the impugned order dated 19-2-1988 came to be passed. The inquiry report dated 4th July 1987 shows that the inquiry committee did not find any substance in the allegations made against the petitioner. After that inquiry report, on 30th July 1987, a resolution was made by the council deciding to "file" the matter. As observed above, the council could not have proceed with any departmental inquiry against the petitioner in view of the interim injunction granted by the Civil Court even if it had not accepted the inquiry report which was in favour of the petitioner. The order of termination made on 19-2-1988 has to be viewed in the background of the above facts. The impugned order records that it was not in the interest of the institution to continue him any further in service, because, the institution had lost confidence in him. In Kamal Kishore Lakshman v.

Management of M/s Pan American World Airways Inc., reported in AIR 1987 SC 229, on which reliance was placed by the learned counsel for the petitioner, the Supreme Court held that loss of confidence by the employer in the employee is a feature which certainly affects the character or reputation of the employee and, therefore, the plea of loss of confidence in the employee indeed casts a stigma. It was held that if the disciplinary inquiry has not preceded the prejudicial order in the case of a government servant, the action would be bad, while in the case of a workman the order could be justified even in the course of adjudication before the appropriate Tribunal under the Industrial Disputes Act. Thus, the employee against whom such a prejudicial order is made, ought to be given an opportunity of dealing with the allegations which have led to passing of such an order.

11. Reliance was placed on Rule 45 of the Rules of Conduct for the employees of the Gujarat Homeopathy Society, Anand, which is re-produced in paragraph 4 of the affidavit-in-reply filed by the society, by the learned counsel for the respondents for contending that the society had ample power to relieve an employee who was confirmed in service by giving three months' notice before the date on which he was to be relieved. The said Rule 45 clearly refers to orders of termination simpliciter and not orders which in reality impose penalty of removal under the guise of termination simpliciter. It will be significant to note that in the context of a similar rule, the Constitution Bench of the Supreme Court in Delhi Road Transport Corporation v. D.T.C. Mazdoor Congress, reported in AIR 1991 SC 101, held that the rule was illegal and void as it was arbitrary and discriminatory and without any guidelines for exercise of powers. Under Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations (1952), which is re-produced in paragraph 11 of the judgement, a similar provision was made for termination of employment of a permanent employee which was terminable on three months' notice on either side and the services of a permanent employee could be terminated on the ground that it was no longer required in the interest of the company without assigning any reason.

12. In the present case, having regard to the fact that there were allegations of grave misconduct against the petitioner against whom a show-cause notice was issued and an inquiry was instituted, but, because of an injunction against the respondents that the departmental

inquiry could not be continued, the only reasonable inference that could be drawn is that the authorities chose to "file" the proceedings with a view to circumvent the interim injunction, and passed an order purporting to have been made under Rule 45 terminating the service of the petitioner on the ground that his services were no more required, as stated in paragraph 4 of the affidavit in-reply. Such a recourse to Rule 45 was not at all permissible and the facts and circumstances of the case clearly warrant an inference that the impugned order of termination is not an order of termination simpliciter, but was in fact intended to be a penalty on the petitioner without holding an inquiry. In any event, the order as it reads clearly cast a stigma on the petitioner and could not have been made without affording an adequate opportunity of hearing to him. The impugned order dated 19-2-1988, therefore, cannot be sustained and is hereby set aside.

13. It has come on record that the petitioner has been gainfully employed, and that, in fact, he has been working as a professor since 16-8-1993. Even before that, it appears that he was running a clinic and having a medical store in the name of his wife. There is, therefore, no warrant for directing any backwages to be paid to the petitioner for the period after his termination of service. The petitioner is at present employed as a professor in Ahmedabad Homeopathy College, as stated by the learned counsel for the petitioner. Therefore, since he would be entitled to be reinstated in view of the impugned order of termination of his service passed on 19-2-1988 having been set aside, he will have to put in his resignation and then, apply for being reinstated on the basis of the present order. Though the petitioner will not be entitled to any backwages or other financial benefit for the interregnum period, he will be entitled to continuity in service on reinstatement. The setting aside of the impugned order for the reasons stated hereinabove will be without prejudice to the powers of the respondent authorities to proceed against the petitioner in the matter in accordance with law subject to the orders in the civil suit which was filed challenging the departmental proceedings. Rule is made absolutely accordingly with no order as to costs.

[R.K.ABICHANDANI, J.]

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